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Supreme Court of the United States

OCTOBER TERM, 196...

No. 442

HOUSTON H. FEASTER, individually and as Director, Alabama State Docks Department, C. U. IRVINE, individually and as General Manager, Operations, Alabama State Docks Department, and the STATE OF ALABAMA,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MacDONALD GALLION,
As Attorney General of the State of Alabama,

WILLIS C. DARBY, JR.,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 196...

No. .....

HOUSTON H. FEASTER, individually and as Director, Alabama State Docks Department, C. U. IRVINE, individually and as General Manager, Operations, Alabama State Docks Department, and the STATE OF ALABAMA,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled cause on the 29th day of March, 1967.

CITATIONS TO OPINIONS BELOW.

The trial court entered its order without opinion. (R. 129.) The opinion of the circuit court of appeals is printed in Appendix A hereto, *infra*, pp. 19-30, and is reported in 377 F.2d 723. The opinion of the circuit court of appeals on the first appeal in this cause is printed in Appendix B hereto, *infra*, pp. 32-41, and is reported in 330 F.2d 671.

JURISDICTION.

The opinion of the circuit court of appeals was entered on March 29, 1967, Appendix A hereto, *infra*, p. 19. Rehearing was denied on June 13, 1967, Appendix A, *infra*, p. 31. (R. 177.) The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED.

1. Should a single federal agency have exclusive authority to determine "carrier" status under the several acts of Congress regulating the "railroad world"?

2. Is a finding of "carrier" status under the Railway Labor Act a prerequisite to a court making the records of a state agency available to the National Mediation Board for the sole purpose of enabling the National Mediation Board to conduct an election (as distinguished from determining "carrier" status) where there is a material issue as to "carrier" status?

3. May a court, consistent with due process and the right to be free from unreasonable searches and seizures, grant the National Mediation Board access to the records of an agency of a state to enable the National Mediation Board to conduct an election among the employees of the state in the absence of a resolution of "carrier" status by the court or the Interstate Commerce Commission?

STATUTES INVOLVED.

The constitution and statutory provisions directly involved in this proceeding are: Amendment IV to the Constitution of the United States, Appendix C, *infra*, p 41; Section 1, First of the Railway Labor Act, 45 U.S.C. 151 First, Appendix D, *infra*, pp. 42-43; Section 1, Fifth of the Railway Labor Act, 45 U.S.C. 151 Fifth, Appendix E, *infra*, pp. 43-44; and, Section 2, Ninth of the Railway Labor Act, 45 U.S.C. 152 Ninth, Appendix F, *infra*, pp. 44-45. The following statutory provisions are also involved: Section 1(3) (a) Interstate Commerce, Act, 49 U.S.C. 1(3)(a), Appendix G, *infra*, pp. 45-46; Section 1(a) Railroad Retirement Tax Act, 26 U.S.C. 3231(a) and (g), Appendix H, *infra*, pp. 46-48; Section 1(a) Railroad Retirement Act of 1937, 45 U.S.C. 228a(a), Appendix I, *infra*, pp. 48-50; Section 1(a) Railroad Unemployment Insurance Act, 45 U.S.C. 351(a), (b) and (c), Appendix J, *infra*, pp. 50-52; Federal Insurance Contributions Act (Social Security Act), 26 U.S.C. 3121(b) (9), Appendix K, *infra*, pp. 52-53; National Labor Relations Act, 29 U.S.C. 152(2), Appendix L, *infra*, p.

53; and, Fair Labor Standards Act, 29 U.S.C. 201, Appendix M, *infra*, p. 54.

STATEMENT.

A.

The Proceedings Below.

The United States brought this action against the State of Alabama and certain of its executive officers to require the State to make the "books and records of the Alabama State Docks Department (Department) showing the names, addresses and job classifications of all persons employed by the . . . Department" available to the National Mediation Board (Mediation Board) in order that the Mediation Board could check the showing of interest of the International Brotherhood of Firemen and Oilers, Helpers, Roundhouse and Railway Shop Laborers (Firemen and Oilers) among the employees of the State's maritime facilities at Mobile and, if the showing was sufficient to enable the Mediation Board to conduct an election among the maritime employees of the State to determine if they desire to be represented by the Firemen and Oilers. (R. 4-11, 31, 34-6, 40.) The trial court denied the Government's motions (a) to quash the notice of the State to take the depositions of certain of the employees of the Mediation Board; (b) for a summary judgment; and, (c) a preliminary injunction. (R. 129-30.)

On appeal from the order denying the motion for a preliminary injunction, the court of appeals acknowledged that the "United States seeks to use this §1292(a) appeal to obtain judicial determination that the . . . Department is a carrier within the meaning of the Railway Labor Act", *infra*, p. 20. Although the carrier issue was the only issue presented by the assignments of error, the court of appeals specifically refused to resolve the carrier issue and, without affording the State a hearing on the carrier issue, directed the district court to issue an order granting the Mediation Board access to the records of the State thus terminating this cause on the merits. (Appendix A, *infra*, pp. 19-30; Appendix N, *infra*, p. 54.)

B.

The Alabama State Docks Department.

In 1919 Congress declared that at least one public water "terminal should exist, constructed, owned, and regulated by . . . [a] public agency of the State and open to the use of all on equal terms" at every city located at a harbor or navigable waterway throughout the United States. Rivers and Harbors Appropriation Act of 1919, 40 Stat. 1275, 1286 (1919). (R. 97.) One of the primary purposes for the development of rivers and harbors by the federal government has been to provide navigable waterways open to the use of all on equal terms for the purpose of reducing railroad rates. 57 Cong. Rec. 3543, 3549

(1919). (R. 98-9.) In furtherance of this national policy, the State authorized, constructed and has since 1928 operated and maintained a great port at Mobile consisting of general cargo piers and warehouses, a bulk material handling plant, grain elevators, cotton compress and warehouse, cold storage plant and bulk oil plant. (R. 98-100, *infra*, p. 27.) In order to insure that everyone would have equal access to the publicly owned maritime facilities in Mobile, the State created and operates the Terminal Railway Alabama State Docks (Terminal Railway) to serve the maritime facilities developed by the State. (R. 99; Appendix A, *infra*, p. 27.) The people of the State of Alabama have invested $37,064,000 in the maritime facilities at the port of Mobile and the sum of $4,082,000 in the Terminal Railway. (R. 101-4, 111.)

The general cargo piers and warehouses, bulk material handling plant, grain elevator, cotton compress, cold storage plant and bulk oil plant handle substantial quantities of goods and commodities which have not been shipped or received by rail; all file tariffs with the Federal Maritime Board pursuant to the requirements of the Shipping Act of 1916, as amended, 46 U.S.C. 801 et seq.; none file tariffs or reports with the Interstate Commerce Commission; the employees of these facilities are civil service employees of the State of Alabama and are covered by the State's "Merit System". Title 55 Code of Alabama 1940, Chapter 9. (R. 40, 101-5, 107.)

The Terminal Railway is a separate, distinct and identifiable facility of the State of Alabama. (R. 110.) The Terminal Railway operates under a certificate of convenience and necessity issued by the Interstate Commerce Commission; the books and records of the Terminal Railway are kept in conformity with the uniform system of accounts established by the Interstate Commerce Commission. The Terminal Railway files an annual report of all of its activities with the Interstate Commerce Commission on a form provided by the Interstate Commerce Commission. (R. 110.) Since 1950 all of the employees of the Terminal Railway have been and are now represented by "labor organizations, national in scope", authorized to represent employees of railroads pursuant to the Railway Labor Act, 45 U.S.C. 151 et seq. Since 1950 collective bargaining agreements between the Terminal Railway and labor organizations, national in scope, have been and are now in existence covering all employees of the Terminal Railway. Only employees of the Terminal Railway are covered by these collective bargaining agreements. (R. 112.) The Terminal Railway is admittedly a "carrier" within the meaning of the acts of Congress regulating the "railroad world".

None of the employees of the Terminal Railway are involved in this proceeding; only the employees of the maritime facilities are involved. (R. 113; Appendix A, *infra*, p. 28.)

Prior to the controversy here involved, the Interstate Commerce Commission, the National Maritime

Board, the National Mediation Board, the National Labor Relations Board, the Internal Revenue Service, the Railroad Retirement Board, and the Social Security Administration, every governmental agency which exercises jurisdiction over the affairs of the Terminal Railway or the maritime facilities of the State, recognized that the Terminal Railway was subject to the acts of Congress regulating the "railroad world" and the maritime facilities were subject to those acts of Congress which regulated, or provided benefits to employees, of the remainder of our industrial society. (R. 107-8, 110, 113-4.)

On July 27, 1959, the Firemen and Oilers filed an application with the Mediation Board requesting the Mediation Board to hold an election among the employees of the State's maritime facilities in Mobile. (R. 30.) On October 21, 1959, after a preliminary investigation, the Mediation Board "asserted jurisdiction". (R. 40, 59.) On January 13, 1960, the Mediation Board denied the State's request for a hearing on the issue of jurisdiction and notified the State "this Board has jurisdiction under the Railway Labor Act over the employees of the Alabama State Dock Department involved in this controversy." (R. 42, 66.) On February 10, 1960, the Mediation Board again denied the request of the State for a formal hearing "to develop the facts necessary to a determination by the National Mediation Board on the question of the jurisdiction of the National Mediation Board over the employees of the State." (R. 67-72.) The Mediation Board desires the books and records

of the State for the purpose of "the compilation of a list of eligible employees and an individual check of the validity of the authorization cards" and to conduct an election. (R. 31, 34, 36, 41.)

REASONS FOR GRANTING THE WRIT.

1. The questions presented are of importance in administering the various acts of Congress regulating the "railroad world".

Congress has separated the railroad industry from all other industry for economic regulations, welfare of employees and regulation of labor relations. The "railroad world" has been described as "a state within a state". *California v. Taylor*, 1957, 353 U.S. 553, 565, 1 L. Ed. 2d 1034, 1042. The Railroad Retirement Act, 45 U.S.C. 228a(a) et seq., and its companion revenue act, Railroad Retirement Tax Act, 26 U.S.C. 3231 et seq., Railroad Unemployment Insurance Act, 45 U.S.C. 351 et seq., and the Hours of Service Act, 45 U.S.C. 61 et seq., provide for the welfare of railroad employees; the welfare of all other employees is governed by the Social Security Act, 42 U.S.C. 301 et seq., and the Fair Labor Standards Act, 29 U.S.C. 201 et seq. The National Labor Relations Act, 29 U.S.C. 151 et seq., governs labor management relations in all interstate industries with the exception of the railroad and air line industries where labor management relations are governed by the Railway Labor Act, 45 U.S.C. 151 et seq.

The language used by Congress in defining the coverage of each of the Acts pertaining to the "railroad world" is in all salient respects identical. Part I of the Interstate Commerce Act, 49 U.S.C. 1(3)(a), (Appendix G, *infra*, pp. 45-46); Section 1, First Railway Labor Act, 45 U.S.C., 151 First, (Appendix D, *infra*, p. 42); Railroad Retirement Tax Act, 26 U.S.C. 3231(a) and (g), (Appendix H, *infra*, pp. 46-48); Railroad Retirement Act of 1937, 45 U.S.C. 228a(a), (Appendix I, *infra*, pp. 48-50); Railroad Unemployment Insurance Act, 45 U.S.C. 351(a),(b) and (c), (Appendix J, *infra*, pp. 50-52).

The Insurance Contributions Act (Social Security Act), 26 U.S.C. 3121(b)(9), (Appendix K, *infra*, pp. 52-53), excludes employees as defined in the Railroad Retirement Tax Act, 26 U.S.C. 3231(a) and (g), (Appendix H, *infra*, pp. 46-48). The National Labor Relations Act also excludes from its coverage "any person subject to the Railway Labor Act", 29 U.S.C. 152(2), (Appendix L, *infra*, p. 53). The overtime provisions of the Fair Labor Standards Act do not apply to employees of "an employer subject to the provisions of Part I of the Interstate Commerce Act," 29 U.S.C. 213(b)(2), (Appendix M, *infra*, p. 54); Hours of Service Act, 45 U.S.C. 161 et seq. establishes maximum hours for certain employees in the "railroad world". The acts of Congress regulating and taxing the "railroad world" and the acts of Congress that regulate and tax all other industry are mutually exclusive; the two regulatory and taxing schemes do not apply to the same facility. *Shields v. Utah Idaho Central Railroad Company*, 305

U.S. 177, 184, 83 L. Ed. 111, 116; *Reynolds v. Northern Pacific Ry. Co.*, 8 Cir., 1948, 168 F.2d 934, 938-9, cert. deni. 335 U.S. 828, 93 L. Ed. 382.

This cause presents a question of whether the rights of the employees of the State's maritime facilities in Mobile are to be measured by the acts of Congress pertaining to the "railroad world" or by other acts of Congress. The underlying problem which gives rise to this litigation, and which must be determined by this Court, now, or, later, is the lack of a decision by this Court specifying the appropriate agency or method for determining the bounds of the "railroad world". The basic problem is similar to the problem which was faced and resolved by this Court in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 3 L. Ed. 2d 775 and *Marine Engineers Beneficial Association v. Interlake Steamship Co.*, 370 U.S. 173, 8 L. Ed. 2d 418.

The legislative history of the 1934 Amendment to the Railway Labor Act conclusively establishes that it was the intention of Congress for the Railway Labor Act and Part I of the Interstate Commerce Act to be coextensive in coverage of persons and instrumentalities. 73 Cong. Rec. 12396 (1934), (Appendix O, *infra*, pp. 55-56). The congressional intent of establishing uniform bounds for the "railroad world" under the various acts of Congress regulating the "railroad world" is established by Pub. L. No. 764, 76th Cong., 3d Sess. (Aug. 13, 1940), 54 Stat. 785, where Congress uniformly amended the definition of employer in "section 1(a) of the Carriers Taxing

Act of 1937, section 1532(a) of the Internal Revenue Code, and section 1(a) of the Railroad Unemployment Insurance Act" and the definition of "carrier" in "Section 1(a) of the Railroad Retirement Act of 1935 and paragraph First of section 1 of the Railway Labor Act." (Appendix Q, *infra*, pp. 56-61.)

We submit that this Court should consider the advisability of applying the doctrine of primary jurisdiction to cases involving a delineation of the bounds of the "railroad world". In *Texas & Pacific Railway Company v. Abilene Cotton Oil Company*, 1907, 204 U.S. 426, 51 L. Ed. 553, this Court held that the Interstate Commerce Commission had the exclusive authority to make certain decisions deemed relevant to the determination of controversies involving railroads. The Commission has the major and continuing responsibility to regulate interstate railroad transportation. A centralized adjudicating process is essential in working out a consistent approach to the status of many facilities which may be a part of the railroad "transportation system". *Cf. Marine Engineers Beneficial Association v. Interlake Steamship Co.*, 370 U.S. 173, 8 L. Ed. 2d 418, where this Court held that determining what is a "labor organization" must in any doubtful case begin with the National Labor Relations Board if the National Labor Relations Act is to operate as a coherent whole. Indeed, the Mediation Board itself has recognized that the Interstate Commerce Commission has the exclusive authority to determine the identity of a "carrier" under the Railway Labor Act. *In the Matter of Representation of Employees of the Houston*

Belt & Terminal Railway Co., R-3571, 2 N.M.B. 226; *In the Matter of New York Central Railroad*, R-890, 1 N.M.B. 197; *In the Matter of Representation of Employees of the Donora Southern Railway Company et al.*, C-1947, 2 N.M.B. 80, 84. The Interstate Commerce Commission already has the power, after hearing and subject to jurisdictional review, to determine whether the State of Alabama is required to comply with Part I of the Interstate Commerce Act with respect to the operation of the public grain elevator, bonded warehouse, cold storage plant, bulk materials handling plant, general cargo piers and warehouses. *United States of America v. Union Stock Yard & Transit Company of Chicago*, 226 U.S. 286, 306, 57 L. Ed. 226, 49 U.S.C. 17. Allowing the Interstate Commerce Commission to exercise the powers conferred upon it by Congress to define the boundaries of the "railroad world" as a prerequisite to the assertion of jurisdiction by the Mediation Board as well as by other federal agencies would insure that the acts of Congress regulating the "railroad world" would remain, as Congress intended, a coherent whole.

2. The decision of the court below is clearly erroneous. The Mediation Board has jurisdiction over the State, as operator of the maritime facilities and over the employees of these maritime facilities if, and only if, the State is a "carrier" in connection with the operation of the maritime facilities. If the State is not a "carrier", the Mediation Board has no jurisdiction and the information sought by the Mediation Board is plainly incompetent or irrelevant

to any lawful purpose of the Mediation Board. *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509, 87 L. Ed. 424, 429. In *Local No. 438 Construction & General Laborers' Union AFL-CIO, Petitioner v. Curry*, 371 U.S. 542, 550, 9 L. Ed. 2d 514, 520, this Court held that a decision of the Supreme Court of Georgia that the courts of Georgia had jurisdiction over a labor dispute in connection with an interlocutory appeal, was final and would support an appeal to the United States Supreme Court, saying:

> Unless this judgment is reviewable now, petitioner . . . must face further proceedings in the state courts which the state courts have no power to conduct.

Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 208, 90 L. Ed. 614, 629, establishes that a corporation may challenge an order for the production of its records if the information sought is not relevant to any lawful inquiry. The right of a corporation; *a fortiori*, the right of a state "to be secure in their . . . papers, and effects, against unreasonable searches and seizures" is established by the Fourth Amendment to the Constitution of the United States. This is the right which the State seeks to protect in this proceeding and this is the right which the Mediation Board seeks to invade.

This is not a case where the State is requesting the Court to review the finding, made without hearing, that the State is a carrier and that the State's employees are employees within the meaning of the Railway Labor Act.

This is a case where the State asks the Court to refrain from making its processes available to force the State to make its private papers available to a federal agency to enable the agency to act outside its statutory jurisdiction. This Court has uniformly held that the courts of the United States may properly exercise their jurisdiction to prevent federal agency action outside of agency jurisdiction. *Leedom v. Kyne*, 358 U.S. 184, 3 L. Ed. 2d 210; *McCulloch v. Sociedad Nacional De Marineros De Honduras*, 372 U.S. 10, 9 L. Ed. 2d 547. In *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297, 307, 88 L. Ed. 61, 67, this Court was careful to refer to the fact that it was not presented with a question of what a court of equity would do "when asked for its affirmative help".

In the court below, in the words of the United States, "*the sole question remaining in this case is whether the Alabama State Docks Department is a 'carrier' for the purposes of Section 2, Ninth of the Railway Labor Act, 45 U.S.C. 152, Ninth.*" (Emphasis in the original.) (Brief of the United States, Appendix P, *infra*, p. 56.) The court below refused to meet the issue presented and held:

> . . .we do not determine nor indicate any opinion upon whether the State is or is not a carrier within the Act, nor upon any of the other claims and defenses asserted by the State.

(Appendix A, *infra*, p. 24.) In short, the court below acted as a rubber stamp. Had Congress intended for the courts to have no more discretion than was exercised below, Congress could, and undoubtedly would, have eliminated the need for the courts to participate in the record production process.

The procedures for settling questions concerning representation contained in the Railway Labor Act and the National Labor Relations Act were designed to eliminate strikes for recognition. The certification of the Firemen and Oilers by the Mediation Board as the collective bargaining representative of the State's maritime employees in the absence of a resolution of "carrier" status would undoubtedly increase the possibility of a strike for recognition and result in Alabama's only port being closed. A resolution of "carrier" status, now, will eliminate the possibility of labor strife over an issue that must be ultimately resolved in the courts.

3. The decision of the court below appears to be in conflict with the decision of the United States Court of Appeals for the Eighth Circuit in *Reynolds v. Northern Pacific Ry. Co.*, 8 Cir., 1948, 168 F.2d 934, 937, 941-2, cert. deni. 335 U.S. 828, 93 L. Ed. 382, where the court laid great stress upon the fact that governmental agencies had recognized that certain persons were not "carriers" within the meaning of the acts regulating the "railroad world" in finding that those persons were in fact not "carriers" when one agency of the United States sought to upset the previously existing status by having the persons de-

clared "carriers". *Cf. United States v. The Alabama Great Southern Railway Company*, 142 U.S. 615, 621, 35 L. Ed. 1134, 1136, where the Court held:

> We think the contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations of that department . . . should be considered as decisive in this suit.

A departure from the rationale of *The Alabama Great Southern* case will open Pandora's box. Current and retired employees will be drifting in and out of the "railroad world". Neither employer, employee nor government agency will be able to determine where the "railroad world" begins or ends until the "carrier" issue is resolved.

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

MacDONALD GALLION,
As Attorney General of the
State of Alabama,

WILLIS C. DARBY, JR.,
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Mobile, Alabama 36601.

CERTIFICATE OF SERVICE.

I, Willis C. Darby, Jr., counsel for petitioners, hereby certify that I have served a copy of the foregoing Petition For A Writ of Certiorari on the attorneys for the respondent by mailing copies thereof, postage prepaid, to the following counsel:

Honorable Vernol R. Jansen
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Dated at Mobile, Alabama, this ... day of July, 1967.

WILLIS C. DARBY, JR.

APPENDIX

APPENDIX A.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23136

UNITED STATES OF AMERICA,
Appellant,

versus

HOUSTON H. FEASTER, individually and as Director ALABAMA STATE DOCKS DEPARTMENT, ET AL.,
Appellees.

Appeal from the United States District Court for the Southern District of Alabama.

(March 29, 1967.)

Before RIVES, GEWIN, and GODBOLD, Circuit Judges.

GODBOLD, Circuit Judge: This eight-year-old case is before us for the second time. In *United States v. Feaster et al,* 330 F.2d 671 (5th Cir., 1964) we held that the complaint of the United States seeking an injunction against the Alabama State Docks stated a cause of action, and reversed and remanded. On remand the District Court denied the motions of the

United States for summary judgment and for a preliminary injunction.

From the order denying the preliminary injunction the United States has appealed under 28 U.S.C.A. 1292(a). Unable to appeal the denial of summary judgment, the United States seeks to use this §1292(a) appeal to obtain judicial determination that the Alabama State Docks Department is a carrier within the meaning of the Railway Labor Act (45 U.S.C.A. 151 et seq), contending that the undisputed facts as shown by the State's answer and the government's motion for summary judgment establish that the State is a carrier. The State seeks to escape making its records available to the National Mediation Board as provided by 45 U.S.C.A. 152, Ninth, on the ground it is not a carrier and says the same facts relied on by the United States establish it is not a carrier.

It is our opinion that the courts may not at this time properly make a determination of the ultimate question whether the State is or is not a carrier, but that under appropriate standards of judicial review the Mediation Board is entitled to access to the records and to an order of the District Court granting the same.[1]

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[1] Nor does the Administrative Procedure Act, 5 U.S.C.A. 1001 et seq. provide a basis for such review. As a general rule, a certification by the Board is not subject to review under the Administrative Procedure Act. E.g., *Kirkland v. Atlantic Coast Line R. Co.*, 167 F.2d 529 (D.C. Cir., 1948) [holding that the Act, as interpreted in *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 64 S.Ct. 95, 88 L. ed. 61 (1943), precluded review within the meaning of 5 U.S.C.A.

One of the basic purposes of the Act is to insure "prompt and orderly settlement" of labor disputes. 45 U.S.C.A. 151a. "There was to be no dragging out of the controversy * * *" *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 305, 64 S. Ct. 95, 88 L. ed. 61, 66 (1943). The very section here involved requires the Board to complete its investigation and certify an employee representative within 30 days after its services are invoked. 45 U.S.C.A. 152, Ninth. After eight years the Board has been able to progress only to a determination by it, successfully frustrated to date, that it has jurisdiction to make an investigation.

The District Court had before it the question of the scope of review, if any, when the Board, having administratively determined that the State is a carrier, seeks the assistance of the District Court to obtain records of the State to carry out the required investigation.[2]

1009.] Cf. *Air Line Dispatchers Ass'n v. National Mediation Board*, 189 F.2d 685 (D.C. Cir.), cert. denied, 342 U.S. 849, 72 S.Ct. 77, 96 L. ed. 641 (1951). Also, the Board's demand for access to the appellee's records and its internal determination of carrier status are not "final agency action" within the meaning of 5 U.S.C.A. 1009(a). §1009 is "merely a declaration of existing law where judicial review is provided." *Atchison, Topeka and Santa Fe Ry. Co. v. United States*, 130 F. Supp. 76 (E.D. Miss.) cert. denied, 350 U.S. 892 (1955). "Finality" for purposes of §1009(a) is determined by application of the traditional tests of ripeness for review. E.g., *Lam Man Chi v. Bouchard*, 314 F.2d 664 (3rd Cir., 1963).

[2] The question is not presented whether at this administrative stage the State could obtain any kind of judicial review of the Board's determination that it is a carrier, by affirmatively seeking equitable relief from the courts based on Board action in excess of its statutory authority or in violation of procedural due process. See *Railway Clerks v. Non-Con-*

It is our opinion that when the Board affirmatively seeks judicial aid as it does here the court is not wholly without power to scrutinize the request. The matter then becomes one of articulating the limits of the court's power to look behind the bare request. The Act gives no subpoena power to the Board; its right to reach records is that given by the last sentence of §152, Ninth: "The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph." But the situation is analogous to subpoena cases. Where an administrative agency issues an authorized subpoena if not honored it must call on a court for an order to enforce it. Here the agency has made demand for access to the records, and it not being honored calls on the court to enforce its authority under the statute to reach the records.

In subpoena cases the Supreme Court has rejected claims that the court must satisfy itself that probable cause exists for the agency's contention that the subject of the subpoena is covered by the statute; the only judicial inquiry to be made in enforcing an agency subpoena is whether the evidence sought is

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tract Employees 380 U.S. 650, 14 L. ed. 2d 133, 85 S. Ct. 1192 (1965); *Boire v. Miami Herald Publishing Co.*, 343 F.2d 17 (5th Cir., 1965) [discussing *Leedom v. Kyne*, 358 U.S. 184, 79 S. Ct. 180, 3 L. Ed. 2d 210 (1958)]. As a general rule "[A]dministrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 68 S. Ct. 431, 92 L. ed. 568 (1948) and cases therein cited.

"plainly incompetent or irrelevant to any lawful purpose" of the agency. *Endicott Johnson Corp. v. Perkins,* 317 U.S. 501, 509, 63 S. Ct. 339, 87 L. ed. 424, 429 (1943). See also *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186, 66 S. Ct. 494, 90 L. ed. 614 (1946); *Tobin v. Banks & Rumbaugh,* 201 F.2d 223 (5th Cir.), cert. denied, 345 U.S. 942 (1953). In *NLRB v. Northern Trust Co.,* 148 F.2d 24 (7th Cir., 1945), an NLRB subpoena case, the court declined to permit an employer to question whether he was engaged in interstate commerce and whether his activities affected commerce.

The record contains adequate evidence to support the right of the Board, at this stage, to see the records over the objections of the State. The "proof" of carrier status referred to in the opinion on the first appeal is not "proof" reaching the standard of burden of proof in trial of a civil case at issue, but "proof" sufficient to show that the Board in asking for records, is not making a demand incompetent and irrelevant to its lawful purposes. Before filing suit for injunction the Board made some investigation of the matter of possible carrier status; it postponed its investigation of the representation dispute to give the State an opportunity to present by written statements and briefs its position that it is not a carrier, and for representatives of the State to confer with the Board in Washington.[3] Both sides presented

[3] The State has, at all stages, objected to the Board's making a determination of carrier status without a hearing. The Board acts more in the capacity of a referee; there is no requirement of a hearing at any stage of the matter. The Board does not enter orders, and its only ultimate finding

additional factual data to the District Court in affidavit form, in support of and in opposition to, the motion for summary judgment.

In making a determination that the Board has submitted proof sufficient to show that its action was not incompetent or irrelevant to its purpose, and not arbitrary, capricious or without foundation, we do not determine nor indicate any opinion upon whether the State is or is not a carrier within the Act, nor upon any of the other claims and defenses asserted by the State.[4]

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of fact is the certificate. *Switchmen's Union of North America v. National Mediation Board,* supra. Cf. *Brotherhood of Railway & Steamship Clerks v. Non-Contract Employees,* supra, 380 U.S. at 662: "[T]he Board's duty to investigate is a duty to make such investigation as the nature of the case requires. An investigation is 'essentially informal, not adversary'; it is 'not required to take any particular form.' . . . . Congress has simply told the Board to investigate and has left to it . . . the methods and procedures which it should employ in each case."

[4] Nor is there before us any question of the scope of, or procedural circumstances in which there may arise, judicial review after certification by the Board, if issued. Without attempting definitive review of all authorities we make the following observations.

A certified bargaining representative may obtain an injunction to require a carrier to bargain. *Virginian Railway Company v. Systems Federation No. 40,* 300 U.S. 515, 57 S. Ct. 597, 81 L. ed. 789 (1937). [Whether the Board or the United States may seek such an injunction is not clear; see Judge Brown's dictum in *United Industrial Workers of Seafarers, etc., v. Board of Trustees,* 351 F.2d 183, 190 (5th Cir., 1965).] In *Switchmen's Union of North America v. National Mediation Board,* supra, the Court specifically noted that it had not determined the review, if any, available when an equity court is asked for affirmative help in the form of a decree to enforce a certification. But see *Aeronautical Radio, Inc., v. National Mediation Board,* 255 F. Supp. 466 (D.D.C., 1966), where an employer sued to set aside an election and the Teamsters intervened asking an order requiring the employer to bargain. On a factual showing that of 400 employees 174 had voted for the Teamsters but 179 had not voted at

We are mindful that the merits of a controversy ordinarily are not to be determined by appeal from

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all, the court held that although it had no power to set aside the certification, it could, since its assistance was sought by way of a decree in equity, decline its aid on equitable considerations.

This Court reviewed the scope of the Board's authority to determine whether plaintiffs were "employees" within the Act in *National Council of Railway Patrolmen's Union v. Sealy,* 152 F.2d 500 (5th Cir., 1945), a suit by the certified union for injunctive relief to require the carrier to bargain. *Airline Dispatchers Association v. National Mediation Board,* 189 F.2d 685 (D. C. Cir.), cert. denied, 342 U.S. 849, 72 S. Ct. 77, 96 L. ed. 641 (1951) involved judicial review of a determination by the Board that it did not have jurisdiction. The Court distinguished cases where the issue was whether the Board had erroneously resolved a disputed representation case from situations involving the power of the Board to resolve the dispute.

In several cases the courts have, after certification, reviewed claims that Mediation Board action has been in excess of its statutory powers, contrary to specific prohibitions of the Act, or in violation of procedural due process. *Teamsters v. National Mediation Board,* 363 F.2d 311 (D. C. Cir., 1963); *Flight Engineers International Association v. National Mediation Board,* supra; see also *Leedom v. Kynes,* supra (National Labor Relations Act). As to such review before certification; see Note 2, supra.

In *Shields v. Utah, Idaho Central Railroad Co.,* 305 U.S. 177, 59 S. Ct. 160, 83 L. ed. 111 (1938) the Interstate Commerce Commission had determined that the railroad was not an interurban electric railway within the proviso of §151, First, after a hearing held at the request of the Mediation Board under the provisions of that section. The Supreme Court allowed the carrier to seek injunctive relief against criminal sanctions of the Act where certification had issued and the carrier had declined to post notices as required by the Act and as ordered by the Board. *Sprague v. Wahl,* 124 F.2d 767 (7th Cir., 1941) is a similar case. The court applied the standard of *Shields*—whether the ICC in arriving at its determination departed from the applicable rules of law and whether its finding had a basis in substantial evidence or was arbitrary and capricious—and held that question must be determined upon the evidence produced before the ICC. *Texas Electric Railway Co. v. Eastus,* 25 F. Supp., 825 (N. D. Texas, 1938), aff'd per curiam 308 U.S. 512, 60 S. Ct. 134, 84 L. ed. 437 (1939) is a like case applying the same standard.

There is a suggestion in *Switchmen's Union of North America v. National Mediation Board,* supra, 320 U.S. at 306-07, that *Shields* may not apply to Mediation Board determinations of

an order denying a temporary injunction. However, the merit of this controversy is so narrow—not whether the State is a carrier but whether the Board has met the limited standard of proof required for access to the records—and the Board so clearly has met that standard, that it would achieve no purpose to remand for further hearing.

REVERSED and REMANDED for entry by the District Court of an order granting to the Mediation Board access to the records.

GEWIN, Circuit Judge, Dissenting:

The question presented by this appeal is a narrow one. We are called upon to decide whether the trial court abused its discretion in reaching the conclusion that the case was not one in which a preliminary injunction should be issued. I find no abuse of discretion. Accordingly, I would affirm the action of the district court and remand the case to the district court for a hearing on the question of whether the State of Alabama is a "carrier" within the meaning

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carrier status, for the Supreme Court emphasized that *Shields* dealt with review of ICC determination of a transportation question in which it had special competency. However, it also distinguished *Shields* on the ground it dealt with the traditional use of equity to enjoin criminal proceedings, a remedy which appears to this Court should be as available to a carrier whose status has been determined by the Mediation Board without hearing as to a carrier whose status has been determined by the ICC after hearing, especially so since such a Board decision is of a transportation-related problem but made without the expertise of the ICC in that field. On the general subject of procedure and judicial review under §152, Ninth, see Comment, Procedure and Judicial Review Under Section 2, Ninth of the Railway Labor Act, 32 *J. Air L. & Com.* 249 (1966).

of the Railway Labor Act, 45 U.S.C. 151 First, with relation to the activities of the State in the operation of certain maritime facilities and whether employees in the maritime facilities of the State are employees within the meaning of the Railway Labor Act.

Under the sponsorship of a national policy to encourage water transportation declared by Congress in 1919, Rivers and Harbors Appropriation Act of 1919, 40 Statute 1275, 1286, the State of Alabama has been operating the Alabama State Docks at Mobile for almost 40 years. In connection with the operation, the Terminal Railway was created for the purpose of serving the maritime facilities of the State and to make such facilities "open to the use of all on equal terms." Such an arrangement eliminates the possibility that any privately owned railroad may monopolize the port facilities constructed by the State to encourage the use of water transportation facilities. The Terminal Railway not only serves the maritime facilities, it also serves private industries located on or adjacent to the property owned by the State in the vicinity of the maritime facilities.

There is no dispute as to the status of the employees of the Terminal Railway. It has long and consistently been recognized that the Terminal Railway is subject to the Railway Labor Act and the services of the mediation board have been used in labor disputes involving the Terminal Railway. It is admittedly a carrier within the meaning of the various acts of Congress regulating railroads.

Aside from the Terminal Railway, the maritime facilities consist of the Docks Department, Bulk Material Handling Plant, Grain Elevator, Cotton Compress and Warehouse, Cold Storage Plant, and Bulk Oil Plant. The present controversy relates to those employees of the several departments mentioned (not including the Terminal Railway) except officers of the State Docks Department, office and clerical employees, and employees who are covered by existing collective bargaining agreements pursuant to the provisions of the Railway Labor Act. All of the employees of the Terminal Railway are represented by unions certified under the Railway Labor Act.

The usual function of a preliminary injunction is to preserve the status quo pending a determination of the case on its merits. While there is no absolute standard by which the discretion of a trial judge is to be determined in granting or refusing a preliminary injunction, it is always his duty to balance the relative conveniences of the parties. The very nature of the question dictates the exercise of a broad, general discretion. The action of the district court should not be disturbed unless the record demonstrates a clear abuse of such discretion. *Calagaz v. DeFries* (5 Cir. 1962) 303 F.2d 588,590; *Bancroft v. Shelley Knitting Mills* (3 Cir. 1959) 268 F.2d 569; *Miami Beach Federal Savings & Loan Assoc. v. Callender* (5 Cir. 1958) 256 F.2d 410,415; *Jimenez v. Barber* (9 Cir. 1958) 252 F.2d 550; *Burton v. Mantanuska Valley Lines* (9 Cir. 1957) 244 F.2d 647,650-1.

When this case was before us on the former appeal, *United States v. Feaster*, 330 F.2d 671 (1964), we reversed and remanded to the district court under the following mandate:

> "The allegation of carrier status is subject to proof just like any other allegation in the complaint. If it is proved, then the appellees are required to make the records available as sought in the complaint."

The "carrier status" issue is still unresolved. There is a complaint alleging that the employees of the maritime facilities are carrier employees and there is a denial of such status. The issue presented should not be decided by summary judgment procedure but there should be a full and complete hearing. This is especially true because the relief sought by preliminary injunction was not to preserve the status quo but rather to completely change it. *Tanner Motor Livery Ltd. v. Avis, Inc.* (9 Cir. 1963) 316 F.2d 804, 808-9. See also *Switzerland Cheese Association, Inc., et al. v. Horne's Market*, ... U.S. ...., 17 L.ed.2d 23 (1966).[1]

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[1] In the *Switzerland Cheese* case the Court stated:

"It is earnestly argued however that, although this order denied a permanent injunction, it was nonetheless 'interlocutory' within the meaning of § 1292(a)(1) *because the motion for summary judgment did service for a motion for a preliminary injunction* (see Federal Glass Co. v. Loshin, supra, at 938) and that therefore 'interlocutory' must also include a denial of a permanent injunction.

"We take the other view not because 'interlocutory' or preliminary may not at times embrace denials of permanent injunctions, but for the reason that the denial of a motion for a summary judgment *because of un-*

At a full hearing upon the merits, the conflicting contentions of the parties can be resolved. The issue presented is not entirely simple and a decision should be reached only after hearing the evidence. See *Pan American World Airways, Inc. v. United Brotherhood of Carpenters & Joiners of America* (9 Cir. 1963) 324 F.2d 217, cert. den. 376 U.S. 964, 11 L.ed.2d 982; *Northwest Airlines v. Jackson* (8 Cir. 1950) 185 F.2d 74; *Walling v. Baltimore Steam Packet Co.* (4 Cir. 1944) 144 F.2d 130; *Allen v. Ocean S.S. Co. of Savannah,* (5 Cir. 1941) 123 F.2d 469.

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resolved issues of fact does not settle or even tentatively decide anything about the merits of the claim. It is strictly a pretrial order that decides only one thing—that the case should go to trial." (Emphasis added)

JUDGMENT.

(Title Omitted.)

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for entry of an order granting to the Mediation Board access to the records, in accordance with the opinion of this Court.

March 29, 1967

Issued as Mandate:

GEWIN, Circuit Judge, dissents.

(Title Omitted.)

ON PETITION FOR REHEARING.

Before RIVES, GEWIN, and GODBOLD, Circuit Judges.

PER CURIAM: It is ORDERED that the petition for rehearing filed in the above entitled and numbered cause is hereby DENIED.

APPENDIX B.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20798

UNITED STATES OF AMERICA,
Appellant,

versus

HOUSTON H. FEASTER, Individually and as Director, ALABAMA STATE DOCKS DEPARTMENT, ET AL,
Appellees.

Appeal from the United States District Court for the Southern District of Alabama.

(April 20, 1964.)

Before TUTTLE, Chief Judge, WISDOM, Circuit Judge, and CARSWELL, District Judge.

TUTTLE, Chief Judge: This is an appeal from a dismissal by the trial court of an action by the United States seeking an injunction to restrain the individual appellees and the state of Alabama, acting through them, from barring access of the National Mediation Board to certain books and records of the Alabama Docks Department. In addition to the re-

straint sought, the United States prayed that a mandatory injunction require the named individuals to make the books and the records that are requested available to the National Mediation Board.

The facts can best be understood with a recitation of the statutory background of the case. Section 2, Ninth, of the Railway Labor Act, 45 U.S.C.A. 152, Ninth, provides that the National Mediation Board, a creature of the Act, is to settle representation disputes among carrier employees. In the area of representation disputes, the coverage of the Act is set forth in two definitional sections. The term "carrier" is defined in Section 1 of the Railway Labor Act to include all carriers by railroad subject to the Interstate Commerce Act and "any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service . . . in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling property transported by railroads . . ." 45 U.S.C.A. 151, First.

The term "employee" as defined in the Act, "includes every person in the service of a carrier . . . who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted . . . by the Commission." Section 145 U.S.C.A. 151, Fifth.

In fulfillment of its statutory duty to settle representation disputes, the Board is authorized to investigate the underlying facts of the dispute and, for that purpose, to have access to any books and records of the carrier, deemed pertinent by the Board.[1]

The facts are relatively simple. The Alabama State Docks Department is an executive agency of the state of Alabama, which operates the state owned dock facilities. Certain of these facilities are at Mobile, Alabama, and include a terminal railroad subject to the Interstate Commerce Act, warehouses, a grain elevator, a cold storage plant and a cotton compress and bonded warehouse. All of these facilities are owned, operated and controlled by the state through the State Docks Department. Appellee Feaster, as Chief executive officer of the Department, is vested with all the powers and authority of the Department. Appellee Irvine, is general manager of operations of the Department. As of 1958, the National Mediation Board, pursuant to Section 2, Ninth, of the Railway Labor Act, had certified duly designated representatives for certain of the employees of the State Docks Department Terminal Railroad.

In 1959, the International Brotherhood of Firemen and Oilers, Helpers, Roundhouse and Railway Shop Laborers filed an application with the Board requesting an investigation of a representation dispute

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[1] "The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph." 245 U.S.C.A. 152, Ninth.

among all of the employees of the Department of Mobile except officers of the Department, office clerical employees and employees in the crafts covered by the existing agreements. Thereupon, the Board requested that appellants be permitted to examine those books and records of the State Docks Department which contained the names, addresses and job classifications of the employees involved in the dispute and requested that the appellees furnish the Board with a list containing the required information. Appellees refused to permit the Board to examine the records and refused to furnish the requested information. Thereupon, the suit was filed.

The defendants moved to dismiss the complaint on the grounds, (1) the district court had no jurisdiction to entertain the action; (2) the complaint failed to state a claim against any of the appellees upon which relief could be granted; (3) the complaint was an attempt to obtain an original writ of mandamus which the district court had no jurisdiction to grant. Without indicating the basis for its order, the district court granted the motions to dismiss on April 23, 1963. This appeal followed.

The first question which presents itself on a consideration of this appeal is whether a cause of action exists in favor of the United States against the officers and against the state of Alabama by virtue of the authorization given to the Mediation Board under the provisions of the Interstate Commerce Act.

The State argues that no such cause of action exists. It says, first, that this is a suit in the nature of a petition for writ of mandamus and that it must, therefore, fail because a writ of mandamus has been abolished by the Federal Rules. The simplest answer to this contention is that this is not such a suit. It is a suit to prohibit officials who have custody of certain records, alleged to be records of a "carrier," who, under the circumstances alleged in the complaint, are required to make them available to the Mediation Board, from obstructing rights granted by statute. The law is plain:

> "The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

The fact, if it be true, as alleged by the appellees, "that Feaster and Irvine have no personal interest in the books and records or in the outcome of the purported controversy," is of no significance. They are the persons who, the Government alleges, are resisting the right of the Board to carry out the Congressional mandate. The district court has the power to consider the complaint and if it determines that these defendants are, in fact, in custody of the records, it has the power to enjoin their conduct which denies the access to them which Congress provides the Mediation Board shall have.

The appellees next argue that the complaint fails to set forth a "judiciable" controversy. This argument seems to be based upon the theory announced by the appellees that "administrative agencies do not have the inherent power to require persons to produce documents." Appellees then point to the fact that Congress did not give the Mediation Board subpoena powers and they deduce from this that Congress did not intend that the language quoted above was meant to be enforced by an original proceeding brought by the United States.

We think the absence of subpoena power and the absence of a specific enactment in the statute providing that the United States or the Board may file suit to enforce the Board's right to access to the records is not dispositive of the case. The Supreme Court has held heretofore in *Steele v. L & N RR Co.*, 323 U.S. 192, that even "an implied" statutory right of Negroes to be fairly represented by the certified bargaining representative of their craft could be enforced by injunction, although the statute gave no specific remedy of this nature. Also, in *Virginian Rwy. v. Federation,* 300 U.S. 515, the Court held that a statutory requirement that the carrier recognize the chosen representative of employees were enforceable by injunction, although no specific right of injunction was stated in the Act.

It is next contended that such an action could not be constitutionally supported because "it is not a case within the meaning of Section 2 of Article 3 of the

Constitution which confers judicial power on the federal courts, for no claim of plaintiff is 'brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs.' ". As to this point, we conclude that *Interstate Commerce Commission v. Brimson*, 154 U.S. 447, settles the law for the proposition that a proceeding to enforce an order for the production of books and records is a case or controversy under Article 3 of the Constitution.

The final and most substantial argument presented here by the appellees runs along these lines: The Railway Labor Act defines "employees" as every person in the service of a carrier "who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission." The complaint alleges that the Board desires access to the books and records of the state of Alabama, which show the names, addresses and job classifications of the employees of the Department to enable it to determine whether the persons employed by the Department are employees as defined in certain orders of the Interstate Commerce Commission. The Board does not have authority to make any such determination, but such authority is vested exclusively in the Interstate Commerce Commission.

This argument is fallacious since it reads the complaint as asserting the right of the Board to

define certain work "as that of an employee or subordinate official," which right is clearly given exclusively to the Interstate Commerce Commission, rather than the right to *determine* whether the particular persons employed by the appellees are actually *performing* "work defined as that of an employee . . . in the orders of the Interstate Commerce Commission." The Board does not claim the right to determine that certain work is or should be railroad employee work; that is the function of the Interstate Commerce Commission. It does claim the right to consider the job classifications of certain designated employees and determine whether it considers that they are performing work which the Interstate Commerce Commission orders have theretofore designated as falling within carrier employment.

If the Mediation Board is to perform its duty under the Railway Labor Act at all, it has the right to ascertain initially whether the persons in the employment of a carrier fall within the orders of the Interstate Commerce Commission. It is not required to defer its proceedings and submit to the Interstate Commerce Commission for determination the question whether certain designated employees are or are not within the classifications covered by orders of the Commission. Nothing in the case of *National Council of Railway Patrolmen's Union v. Sealy,* 5 Cir., 150 F. 2d 500, is in conflict with this. That case grew out of an effort by a group of employees who sought to have the Court determine that the work they were doing should properly be "*defined* as that

of an employee or subordinate official of a carrier when the Interstate Commerce Commission had issued no order touching the kind of work there being performed." (Emphasis added.) This Court merely affirmed a judgment of the district court contrary to the contention that the work there should be so classified.

Appellees further contend that the failure of the complaint to allege that "the Interstate Commerce Commission has determined that the Alabama State Docks Department is a 'carrier,' " is fatal because, they say, there must be a prior determination by the Interstate Commerce Commission of the carrier status of the employer of the specific employees as to whom the records are sought before this proceeding can go forward. We think this contention is without any substance. The complaint alleges that "Alabama State Docks Department is a carrier within the meaning of the Act." The Act itself defines a carrier as including "any express company, sleeping car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad, and which operates any equipment or facilities or performs any service (other than trucking services) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad . . . ."

We find no basis for the contention by appellees that there must be a prior determination by the Commission that the particular part of the function performed by the appellees here constitute them a "carrier" before this action can be brought. The allegation of carrier status is subject to proof just like any other allegation in the complaint. If it is proved, then the appellees are required to make the records available as sought in the complaint.

The judgment is REVERSED and the case REMANDED to the district court for further proceedings not inconsistent with this opinion.

APPENDIX C.

CONSTIUTION OF THE UNITED STATES

AMENDMENT IV—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX D.

SECTION 1, FIRST OF RAILWAY LABOR

45 U.S.C. 151, First

First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "carrier" shall not include any com-

pany by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

APPENDIX E.

SECTION 1, FIFTH OF RAILWAY LABOR ACT

45 U.S.C. 151, Fifth

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

APPENDIX F.

SECTION 2, NINTH OF THE RAILWAY LABOR ACT

45 U.S.C. 152 Ninth

Ninth. "If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other ap-

propriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

APPENDIX G.

SECTION 1(3)(a) of INTERSTATE COMMERCE ACT

49 U.S.C. 1(3)(a)

(a) The term "common carrier" as used in this chapter shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this chapter it shall be held to mean "common carrier." The term "railroad" as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or

operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this chapter includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

APPENDIX H.

RAILROAD RETIREMENT TAX ACT

26 U.S.C. 3231(a) and (g)

(a) Employer.—For purposes of this chapter, the term "employer" means any carrier (as defined in subsection (g)), and any company which is directly

or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer; except that the term "employer" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Secretary or his delegate, or upon complaint of any party interested, to determine after hearing whether any line operated by electric power falls within the terms of this exception. The term "employer" shall also include railroad associations, traffic associations, tariff bureaus, demurrage bureaus, weighing and inspection bureaus, collection agencies and other associations, bureaus, agencies, or organizations controlled and maintained wholly or principally by two or more employers as hereinbefore defined and engaged in the performance of serv-

ices in connection with or incidental to railroad transportation; and railway labor organizations, national in scope, which have been or may be organized in accordance with the provisions of the Railway Labor Act, as amended (44 Stat. 577; 45 U.S.C., chapter 8), and their State and National legislative committees and their general committees and their insurance departments and their local lodges and divisions, established pursuant to the constitutions and bylaws of such organizations. The term "employer" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to an employer where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

* * *

(g) Carrier.—For purposes of this chapter, the term "carrier" means an express company, sleeping-car company, or carrier by railroad, subject to part I of the Interstate Commerce Act (49 U.S.C., chapter 1).

APPENDIX I.

RAILROAD RETIREMENT ACT OF 1937 As Amended

45 U.S.C. 228a(a)

(a) The term "employer" means any carrier (as defined in subsection (m) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under com-

mon control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer: *Provided, however,* That the term "employer" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is authorized and directed upon request of the Board, or upon complaint of any party interested, to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "employer" shall also include railroad associations, traffic associations, tariff bureaus, demurrage bureaus, weighing and inspection bureaus, collection agencies and other associations, bureaus, agencies, or organizations controlled and maintained wholly or principally by two or more employers as hereinbefore defined and engaged in the performance of services in connection with or incidental to railroad transportation; and railway labor organizations, national

in scope, which have been or may be organized in accordance with the provisions of the Railway Labor Act, as amended, and their State and National legislative committees and their general committees and their insurance departments and their local lodges and divisions, established pursuant to the constitution and bylaws of such organizations. The term "employer" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to an employer where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

APPENDIX J.

RAILROAD UNEMPLOYMENT INSURANCE ACT

45 U.S.C. 351(a)(b) and (c)

(a) The term "employer" means any carrier (as defined in subsection (b) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any

receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer: *Provided, however,* That the term "employer" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is authorized and directed upon request of the Board, or upon complaint of any party interested, to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "employer" shall also include railroad associations, traffic associations, tariff bureaus, demurrage bureaus, weighing and inspection bureaus, collection agencies, and other associations, bureaus, agencies, or organizations controlled and maintained wholly or principally by two or more employers as hereinbefore defined and engaged in the performance of services in connection with or incidental to railroad transportation; and railway labor organizations, national in scope, which have been or may be organized in accordance with the provisions of the Railway Labor Act, and their State and National legislative committees and their general committees and their insurance departments and their local lodges and divisions, established pursuant to the constitution and bylaws of such organizations. The term "employer" shall not include any company

by reason of its being engaged in the mining of coal, the supplying of coal to an employer where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

(b) The term "carrier" means an express company, sleeping-car company, or carrier by railroad, subject to chapter 1 of Title 49.

(c) The term "company" includes corporations, associations, and joint-stock companies.

APPENDIX K.

INSURANCE CONTRIBUTIONS ACT (SOCIAL SECURITY ACT)

26 U.S.C. 3121(b)(9)

(b) Employment.—For purposes of this chapter, the term "employment" means any service performed after 1936 and prior to 1955 which was employment for purposes of subchapter A of chapter 9 of the Internal Revenue Code of 1939 under the law applicable to the period in which such service was performed, and any service, of whatever nature, performed after 1954 either (A) by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the em-

ployee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, or (B) outside the United States by a citizen of the United States as an employee for an American employer (as defined in subsection (h)); except that, in the case of service performed after 1954, such term shall not include—

* * *

(9) service performed by an individual as an employee or employee representative as defined in section 3231;

APPENDIX L.

NATIONAL LABOR RELATIONS ACT As Amended

29 U.S.C. 152(2)

The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

APPENDIX M.

FAIR LABOR STANDARDS ACT

29 U.S.C. 213(b)(2)

The provisions of section 207 of this title shall not apply with respect to * * * any employee of an employer subject to the provisions of part I of the Interstate Commerce Act.

APPENDIX N.

EXCERPTS FROM BRIEF FOR APPELLANT, P. 7, UNITED STATES v. FEASTER, ET AL, 5 Cir., 1967, 377 F.2d 723

SPECIFICATION OF ERRORS

The district court erred in failing to hold that the Alabama State Docks Department is a "carrier" within the meaning of the Railway Labor Act.

The district court erred in failing to grant a preliminary injunction.

APPENDIX O.

LEGISLATIVE HISTORY OF THE RAILWAY LABOR ACT As Amended

The Railway Labor Act as amended was written by Mr. Eastman, the Federal Coordinator of Transportation. Mr. Eastman in explaining the "salient features of the bill," 73 Cong. Rec. 12396 (1934) had this to say:

> In the paragraph of section 1 marked "First", there is a change in the present definition of the term "carrier." This change is intended to bring within the scope of the act operations which form an integral part of railroad transportation, but which are performed by companies which are not now subject to the Railway Labor Act. The most important illustration is found in the refrigerator-car companies, which own refrigerator cars operated by the railroads and perform certain functions connected with refrigeration service. Another illustration is found in the companies to which railroads have on occasion contracted out their maintenance work on equipment and even on way and structures. The thought is that concerns which function in this way as an integral part of the railroad transportation system should be subject to the same duties and obligations with respect to labor controversies as the railroads themselves and as the express and sleeping-car companies. This object is attained by including in the definition of "carrier" any com-

pany "operating any equipment or facilities or furnishing any service included within the definition of the terms 'railroad' and 'transportation' as defined in the Interstate Commerce Act." Perhaps a better way can be found of accomplishing the desired result, but it was thought that this language would serve the purpose.

APPENDIX P.

EXCERPT FROM BRIEF FOR APPELLANT, PP. 8-9, UNITED STATES v. FEASTER, ET AL, 5 Cir., 1967, 377 F.2d 723

Under this Court's remand order issued on the prior appeal (330 F.2d 671), *the sole question remaining in this case is whether the Alabama State Docks Department is a "carrier" for purposes of Section 2, Ninth of the Railway Labor Act, 45 U.S.C. 152, Ninth.* (Emphasis in the original.)

APPENDIX Q.

PUB. L. No. 764, 76th CONG., 3d SESS. (Aug. 13, 1940), 54 Stat. 785

To provide for more uniform coverage of certain persons employed in coal-mining operations with respect to insurance benefits provided for by certain Federal Acts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1 (a) of the Railroad Retirement Act of 1937, "section 1 (a) of the Carriers Taxing Act of 1937, section 1532 (a) of the Internal Revenue Code, and section 1 (a) of the Railroad Unemployment Insurance Act" are amended, effective in the case of each such Act as of the date of its enactment, by adding at the end of each such section the following new sentence: "The term 'employer' shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to an employer where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities."

Sec. 2. "Section 1 (a) of the Railroad Retirement Act of 1935 and paragraph First of section 1 of the Railway Labor Act," as amended, are amended, effective in the case of each such Act as of the date of its enactment, by adding at the end of each such section and paragraph the following new sentence: "The term 'carrier' shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities."

Sec. 3. Section 1 (b) of the Railroad Retirement Act of 1937, section 1 (b) of the Carriers Taxing Act of 1937, section 1532 (b) of the Internal Revenue Code,

the first paragraph of section 1 (d) of the Railroad Unemployment Insurance Act, section 1 (b) of the Railroad Retirement Act of 1935, and paragraph Fifth of section 1 of the Railway Labor Act, as amended, are amended, in the case of each such Act as of the date of its enactment, by adding at the end of each such section and paragraph the following new paragraph:

> "The term 'employee' shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple."

Sec. 4. (a) The laws hereby expressly amended, the Social Security Act, approved August 14, 1935, and all amendments thereto, shall operate as if each amendment herein contained had been enacted as a part of the law it amends, at the time of the original enactment of such law.

(b) No person (as defined in the Carriers Taxing Act of 1937) shall be entitled, by reason of the provisions of this Act, to a refund of, or relief from liability for, any income or excise taxes paid or accrued, pursuant to the provisions of the Carriers Taxing Act of 1937 or subchapter B of chapter 9 of the Internal Revenue Code, prior to the date of the enactment of this Act by reason of employment in the service of any carrier by railroad subject to part

I of the Interstate Commerce Act, but any individual who has been employed in such service of any carrier by railroad subject to part I of the Interstate Commerce Act as is excluded by the amendments made by this Act from coverage under the Carriers Taxing Act of 1937 and subchapter B of chapter 9 of the Internal Revenue Code, and who has paid income taxes under the provisions of such Act or subchapter, and any carrier by railroad subject to part I of the Interstate Commerce Act which has paid excise taxes under the provisions of the Carriers Taxing Act of 1937 or subchapter B of chapter 9 of the Internal Revenue Code, may, upon making proper application therefor to the Bureau of Internal Revenue, have the amount of taxes so paid applied in reduction of such tax liability with respect to employment, as may, by reason of the amendments made by this Act, accrue against them under the provisions of title VIII of the Social Security Act or the Federal Insurance Contributions Act (subchapter A of chapter 9 of the Internal Revenue Code).

(c) Nothing contained in this Act shall operate (1) to affect any annuity, pension, or death benefit granted under the Railroad Retirement Act of 1935 or the Railroad Retirement Act of 1937, prior to the date of enactment of this Act, or (2) to include any of the services on the basis of which any such annuity or pension was granted, as employment within the meaning of section 210 (b) of the Social Security Act or section 209 (b) of such Act, as amended. In any case in which a death benefit alone has been granted, the amount of such death benefit attributable to

services, coverage of which is affected by this Act, shall be deemed to have been paid to the deceased under section 204 of the Social Security Act in effect prior to January 1, 1940, and deductions shall be made from any insurance benefit or benefits payable under the Social Security Act, as amended, with respect to wages paid to an individual for such services until such deductions total the amount of such death benefit attributable to such services.

(d) Nothing contained in this Act shall operate to affect the benefit rights of any individual under the Railroad Unemployment Insurance Act for any day of unemployment (as defined in Section 1 (k) of such Act) occurring prior to the date of enactment of this Act.

Sec. 5. Any application for payment filed with the Railroad Retirement Board prior to, or within sixty days after, the enactment of this Act shall, under such regulations as the Social Security Board may prescribe, be deemed to be an application filed with the Social Security Board by such individual or by any person claiming any payment with respect to the wages of such individual, under any provision of section 202 of the Social Security Act, as amended.

Sec. 6. Nothing contained in this Act, nor the action of Congress in adopting it, shall be taken or considered as affecting the question of what carriers, companies, or individuals, other than those in this Act specifically provided for, are included in or excluded from the provisions of the various laws to which this Act is an amendment.

Sec. 7. (a) Notwithstanding the provisions of section 1605 (b) of the Internal Revenue Code, no interest shall, during the period February 1, 1940, to the eighty-ninth day after the date of enactment of this Act, inclusive, accrue by reason of delinquency in the payment of the tax imposed by section 1600 with respect to services affected by this Act performed during the period July 1, 1939, to December 31, 1939, inclusive, with respect to which services amounts have been paid as contributions under the Railroad Unemployment Insurance Act prior to the date of enactment of this Act.

(b) Notwithstanding the provisions of section 1601 (a) (3) of the Internal Revenue Code, the credit allowable under section 1601 (a) against the tax imposed by section 1600 for the calendar year 1939 shall not be disallowed or reduced by reason of the payment into a State unemployment fund after January 31, 1940, of contributions with respect to services affected by this Act performed during the period July 1, 1939, to December 31, 1939, inclusive, with respect to which services amounts have been paid as contributions under the Railroad Unemployment Insurance Act prior to the date of enactment of this Act: *Provided*, That this subsection shall be applicable only if the contributions with respect to such services are paid into the State unemployment fund before the ninetieth day after the date of enactment of this Act.

Approved, August 13, 1940.